Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 80-4178/81-4351
DC No. 77-2889

Roni K. Dogherra,
Plaintiff-Appellee,

vs.

Safeway Stores, Inc.,
Defendant-Appellant.

[Filed June 21, 1982]

OPINION

Appeals from the United States District Court
for the Northern District of California
Spencer Williams, District Judge, Presiding
Argued and Submitted January 12, 1982

Before: BROWNING, Chief Judge; SKOPIL and NORRIS, Circuit Judges

SKOPIL, Circuit Judge:

INTRODUCTION

Safeway terminated Dogherra for failing to return from leave as required. Dogherra insisted that she had notified her assistant manager, Martinez, prior to the end of her leave of her availability to work. Dogherra asked her union to file a grievance. The union dispatched investigators. Martinez allegedly told them that Dogherra had not reported for work before her leave ended. The union dropped Dogherra's grievance. Dogherra was awarded unemploy-

ment compensation, over Safeway's objection. The union sought to reopen Dogherra's grievance. At a hearing before an arbitrator, Safeway argued that Dogherra's grievance was barred by laches. The arbitrator agreed with Safeway and held the grievance non-arbitrable, stating that once the grievance was dropped, it could not be reviewed five months later. Martinez subsequently admitted that his statement that Dogherra had not reported for work before her leave ended was a lie.

Dogherra sued pursuant to section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. The district court held that Martinez' lie "thwarted and subverted Plaintiff's efforts to arbitrate her grievance." The district court concluded that Safeway violated the collective bargaining agreement and ordered Safeway to reinstate Dogherra and compensate her for lost wages. The district court taxed Safeway with costs and attorneys' fees of $50,305. Safeway appeals.

ISSUES

1. Did the district court clearly err in finding that Martinez was Safeway's agent when he lied to union investigators?

2. Did the district court clearly err in finding that Martinez' lie caused the union to drop Dogherra's grievance?

3. Did the district court err in holding that Martinez' lie vitiated the finality and binding effect of the arbitral decision?

4. Did the district court abuse its discretion in awarding Dogherra $50,305 in attorneys' fees and costs?

DISCUSSION

I. Agency.

A finding that one person is another's agent is generally reviewed as a question of fact, governed by the clearly erroneous standard. *See Aguirre v. Automotive Teamsters*, 633 F.2d 168, 174 (9th Cir. 1980); *Laborers & Hod Carriers Local 341 v. NLRB*, 564 F.2d 834, 839 (9th Cir. 1977). The nature and extent of the agent's authority and whether apparent authority existed are also questions of fact. *Lockwood v. Wolf Corp.*, 629 F.2d 603, 609 (9th Cir. 1980); *Coast Trading Co. v. Cudahy Co.*, 592 F.2d 1074, 1978 (9th Cir. 1979).

Under section 301, determinations regarding agency are governed by common law principles. *Aguirre v. Automotive Teamsters*, 633 F.2d at 171; *Hasbrouck v. Sheet Metal Workers Local 232*, 586 F.2d 691, 693 (9th Cir. 1978). Actual authorization or subsequent ratification is not controlling. 29 U.S.C. § 185(e). A principal may be liable if its agent has implied or apparent authority. *Laborers & Hod Carriers Local 341 v. NLRB*, 564 F.2d at 839. Even specifically forbidden acts may be within an agent's authority. *Id.; NLRB v. ILWU Local 10*, 283 F.2d 558, 565 (9th Cir. 1960). An act is not imputed to the principal if the agent has no intention to further the principal's interests. *NLRB v. ILWU Local 10*, 283 F.2d at 565, *quoted in Hasbrouck v. Sheet Metal Workers Local 232*, 586 F.2d at 693. An act is not imputed to a principal where third parties know that the agent is not speaking for the principal. *Butler-Johnson Corp. v. NLRB*, 608 F.2d 1303, 1306 (9th Cir. 1979); *NLRB v. Sonora Sundry Sales, Inc.*, 399 F.2d 930, 935-36 (9th Cir. 1968).

Safeway contends that the district court made no finding that Martinez was Safeway's agent. This argument appears for the first time on appeal in Safeway's reply brief. We cannot say that the appellee has not been misled nor that the issue has been fully explored. Accordingly, we decline to consider it. *Ellingson v. Burlington Northern, Inc.*, 653 F.2d 1327, 1331-32 (9th Cir. 1981).

Safeway also argues that no record evidence would support such a finding. Safeway concedes that Martinez, as assistant manager, was empowered to reinstate employees returning from leaves of absence. Safeway argues only that Martinez was not and could not have been seen as its agent when he lied to union investigators. Safeway notes that Martinez and Dogherra were members of the same union. Safeway also argues that it did not tell Martinez to lie nor did it know what Martinez told the union investigators.

When the union investigators sought to ascertain whether Dogherra had reported for work, they spoke to Martinez precisely because Safeway had empowered him to reinstate employees returning from leaves of absence. We cannot say that the district court clearly erred in finding that Martinez was Safeway's agent for purposes of arranging for Dogherra's return from leave.

The agency is not necessarily vitiated even if Safeway did not tell Martinez to lie nor know what Martinez told the union investigators. As noted above, even acts specifically forbidden by the principal may be within the scope of the agent's authority. *E.g., NLRB v. ILWU Local 10*, 283 F.2d at 564-65. Martinez stated that he understood that Safeway did not want Dogherra as its employee. He felt

that lying to the union investigators would help attain Safeway's goal. He intended to further Safeway's interests. His conduct is therefore chargeable to Safeway.

II. The Decision to Drop the Grievance.

The reason the union dropped Dogherra's grievance is a fact question, reviewed under the clearly erroneous standard.

Safeway conceded that Martinez told a union investigator that Dogherra had not reported for work. Safeway argues that Martinez made this statement after the union had dropped Dogherra's grievance and was deciding whether to reopen it. This argument appears for the first time in Safeway's reply brief on appeal. Dogherra has not had an opportunity to meet it. We decline to consider it. *Ellingson v. Burlington Northern, Inc.*, 653 F.2d at 1332; *Duval Corp. v. Donovan*, 650 F.2d 1051, 1054 (9th Cir. 1981).

Safeway also argues that factors other than Martinez' statement led the union to drop Dogherra's grievance. There was evidence that Dogherra's failure to obtain a medical release did not cause the union to drop her grievance. The district court was justified in concluding that Martinez' statement had a greater effect on the union investigators than the fact that other store employees had no recollection of the occurrences. The district court did not clearly err in deciding Martinez' conduct was the determinative factor behind the union's decision to drop the grievance. No doubt had Martinez volunteered the truth during the initial investigation. Dogherra's claim would have been strong, and it seems highly probable that the union would have pursued the grievance.

III. Repudiation of the Arbitral Process.

The parties collective bargaining agreement specified arbitration as the preferred method of dispute resolution. As a result, we will not disturb an arbitration award "except on the grounds of fraud, deceit, or breach of the duty of fair representation or unless the grievance proceduce was a 'sham, substantially inadequate or substantially unavailable,'" *Castaneda v. Dura-Vent Corp.*, 648 F.2d 612, 619 (9th Cir. 1981) (quoting *Harris v. Chemical Leaman Tank Lines*, 437 F.2d 167, 171 (5th Cir. 1971)). Fraud is also a ground for vacating an arbitral award under the Federal Arbitration Act. 9 U.S.C. § 10(a). Neither the Supreme Court nor this court has ever held the Federal Arbitration Act applicable to arbitration of labor disputes. *See Textile Workers v. Lincoln Mills*, 353 U.S. 448, 466-67 (1957) (Frankfurter, J., dissenting); *Local 1020, United Brotherhood of Carpenters v. FMC Corp.*, 658 F.2d 1285, 1289-90 (9th Cir. 1981); *Local 13, ILWU v. Pacific Maritime Ass'n*, 441 F.2d 1061, 1064-65 & n.5 (9th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972). Because fraud is a ground for vacating an arbitral award under either the Federal Arbitration Act or the federal common law fashioned from the policy of the national labor laws under the authorization of *Textile Workers v. Lincoln Mills*, 353 U.S. at 457, we need not decide whether the Federal Arbitration Act governs labor arbitrations. *See Local 1020, United Brotherhood of Carpenters v. FMC Corp.*, 658 F.2d at 1295; *Service Employees Int'l Union, Local 36 v. Office Center Services*, 670 F.2d 404, 406-08 & n.6 (3d Cir. 1982); *General Warehousemen & Helpers Local 767 v. Standard Brands, Inc.*, 579 F.2d 1282, 1294 & n.9 (5th Cir. 1978) (en banc), *cert. dismissed*, 441 U.S. 957 (1979).

Obtaining an award by perjured testimony constitutes fraud. *See Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.*, 397 F.2d 594, 598 (3d Cir.) (dictum), *cert. denied*, 393 U.S. 954 (1968); *Shearson Hayden Stone, Inc. v. Liang*, 653 F.2d 310, 313 (7th Cir. 1981); *Karppinen v. Karl Kiefer Machine Co.*, 187 F.2d 32, 34-35 (2d Cir. 1951) (assuming without deciding the question) (construing 9 U.S.C. § 10(a)). Accordingly, intentionally giving a false statement to union investigators causing them to drop the grievance until after it was time-barred also constitutes fraud. Congress anticipated "that the contractual machinery would operate within some minimal levels of integrity." *Hines v. Anchor Motor Freight*, 424 U.S. 545, 571 (1976).

Yet in order to protect the finality of arbitration decisions, courts must be slow to vacate an arbitral award on the ground of fraud. *E.g., Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.*, 397 F.2d at 598. The fraud must not have been discoverable upon the exercise of due diligence prior to the arbitration. *Shearson Hayden Stone, Inc. v. Liang*, 653 F.2d at 313. The fraud must materially relate to an issue in the arbitration. *Id.* The fraud must be established by clear and convincing evidence. *See Karppinen v. Karl Kiefer Machine Co.*, 187 F.2d at 34. *Compare England v. Doyle*, 281 F.2d 304, 309-10 (9th Cir. 1960) (construing Fed.R.Civ.P. 60(b)); *Wilson v. Thompson*, 638 F.2d 801, 804 (5th Cir. 1981) (same).

The arbitrator ruled the grievance non-arbitrable because the union had dropped the grievance five months earlier. The district court found the union had dropped the grievance because of Martinez' lie. Hence, the fraud was material to laches—the only issue arbitrated. The

parties did not argue, and the district court did not decide, whether the fraud was reasonably discoverable prior to the arbitration. And although the court found fraud, it did not state whether it had been proven by clear and convincing evidence. Accordingly, we must remand to the district court for further proceedings on these points.

Although courts have power to remand cases to an arbitration panel in certain circumstances under the Federal Arbitration Act, 9 U.S.C. §§ 10(e), 11, as well as under the federal common law governing labor arbitrations, *see Hanford Atomic Metal Trades Council v. General Electric Co.*, 353 F.2d 302, 307-308 (9th Cir. 1965); *UMW District No. 5 v. Consolidation Coal Co.*, 666 F.2d 806, 811 (3d Cir. 1981); *Burkart Randall v. Lodge 1076, IAM*, 658 F.2d 462, 468 (7th Cir. 1981), we need not decide whether ordinarily remand should be required upon the district court's finding that fraud vitiated the arbitral ruling. Remand would serve no purpose here. A finding of fraud by Safeway would necessarily imply Dogherra was wrongfully discharged, for both questions turn upon the same issue of fact—*i.e.*, whether Dogherra timely informed Martinez that she was available for work. Therefore, should the district court find for Dogherra on the question of fraud, it must also enter judgment for her on the merits.

IV. Attorneys' Fees.

A prevailing litigant ordinarily may not collect attorneys' fees. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975). A court may assess attorneys' fees "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Id.* at 258-59 (quoting *F.D. Rich Co. v. United States ex rel.*

Industrial Lumber Co., 417 U.S. 116, 129 (1974)). "Bad faith may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation." *Hall v. Cole*, 412 U.S. 1, 15 (1973), *quoted in Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980). An award of attorneys' fees for bad faith "is punitive and the penalty can be imposed 'only in exceptional cases and for dominating reasons of justice.'" *United States v. Standard Oil Co.*, 603 F.2d 100, 103 (9th Cir. 1979) (quoting 6 J. Moore, *Moore's Federal Practice* ¶ 54.77[2] (2d ed. 1972)). *Accord, Cornwall v. Robinson*, 654 F.2d 685, 687 (10th Cir. 1981). Within these guidelines, an award of attorneys' fees is within the district court's discretion. *See Gluck v. American Protection Industries*, 619 F.2d 30, 32 (9th Cir. 1980); *Seymour v. Hull & Moreland Engineering*, 605 F.2d 1105, 1116-17 (9th Cir. 1979). We review a finding of bad faith under the clearly erroneous standard. *Edinburgh Assurance Corp. v. R.L. Burns Corp.*, 669 F.2d 1259, 1262 (9th Cir. 1982).

The district court found bad faith on Safeway's part because of Martinez' lie, and because Safeway pursued the action after it discovered the lie, particularly by bringing needless, almost frivolous motions. The district court did not state which motions were needless. It granted Safeway's early motions leading to the dismissal of Dogherra's pendent claims. It denied Safeway's motions for summary judgment and for reconsideration. Safeway's arguments were not precluded by precedent nor by the fact that Martinez admitted lying. Safeway did not concede that Martinez actually lied or that it knew he lied. It only concedes that Martinez *admitted* lying. Safeway contends Martinez' "admission" may have been fabricated since he and Safeway

were on bad terms. To find Safeway acted in bad faith, it would have been necessary to find that Safeway knew or believed Martinez actually lied. Absent such findings, the district court clearly erred in finding that Safeway acted in bad faith. *See Union Bank v. Winnebago Industries*, 528 F.2d 95, 99 (9th Cir. 1975).

CONCLUSION

The district court did not clearly err in finding that Martinez was Safeway's agent when he lied about Dogherra's reporting back for work, nor in finding that Martinez' lie caused the union to drop Dogherra's grievance. We must remand to the district court for a determination of whether there was clear and convincing evidence of fraud, which went to a material issue and which could not have been discovered prior to the arbitration. If the district court finds such fraud, it must rule for Dogherra on the merits as well. We reverse the district court's award of attorneys' fees, and remand for further proceedings not inconsistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

Appendix B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 80-4178/81-4351
DC No. 77-2889

Roni K. Dogherra,
Plaintiff-Appellee,

vs.

Safeway Stores, Inc.,
Defendant-Appellant.

[Filed Aug. 19, 1982]

ORDER

Appeals from the United States District Court
for the Northern District of California
Spencer Williams, District Judge, Presiding
Argued and submitted January 12, 1982

Before: BROWNING, Chief Judge; SKOPIL and NORRIS, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge called for a vote on whether to rehear the case en banc pursuant to Fed.R. App.P. 35.

The petition for rehearing and suggestion for rehearing en banc are denied.

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 77-2889 SWSJ

Roni K. Dogherra,
Plaintiff,

vs.

Safeway Stores, Inc., a California corporation,
Defendant.

ORDER DENYING MOTIONS FOR RECONSIDERATION AND FOR CERTIFICATION OF ISSUE

This case arises out of an alleged wrongful termination. In previous rulings, and by means of voluntary dismissals, numerous claims and defendants have been dropped from this case. All that remains is a claim against plaintiff's former employer under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, for breach of a collective bargaining agreement.

BACKGROUND

Essentially, plaintiff's claim consists of an allegation that, following a permissible and authorized six month medical leave of absence, she was wrongfully terminated by defendant Safeway Stores. The reason given for her termination was that she had not informed her store of her desire to return to work within the requisite time period. Plaintiff, however, has contended all along that she told two management personnel that she wanted to return, a

Wayne Clough and an Arthur Martinez. Those two denied ever speaking to her about it.

Following plaintiff's termination, the union initiated grievance proceedings pursuant to the collective bargaining agreement. Before reaching the arbitration stage, however, the union dropped the grievance. As later explained by a union official, they had not been able to confirm a medical release from plaintiff's doctor nor had they been able to confirm her alleged conversation with Martinez.

Plaintiff also pursued unemployment insurance. At administrative hearings held in connection with her claim, Clough and Martinez testified they had not spoken to her as she alleged. Nevertheless, the agency found that she had been terminated without cause and awarded her benefits. Based on this, it seems, the union sought to reopen plaintiff's grievance proceeding. The employer objected, and the issue of arbitrability—not the merits of plaintiff's grievance—was then arbitrated. Basing his decision on concepts closely akin to the doctrine of laches, the arbitrator found that the grievance had been lost when the union originally dropped it.

Thereafter plaintiff filed this action. The union was named as a defendant but was dismissed pursuant to a stipulation by plaintiff.

On August 10, 1979, the motion of the sole remaining defendant, Safeway Stores, for summary judgment came on for hearing. That motion was based on defendant's contention that, because plaintiff does not allege her union breached its duty of fair representation, she is bound by the arbitration award previously issued in defendant's favor and this court has no jurisdiction to consider her

breach of contract claim. The motion was denied. Defendant has now moved for reconsideration of that ruling or, in the alternative, for certification of the issue for interlocutory appeal pursuant to 23 U.S.C. § 1292(b). For the reasons given below, both motions are denied.

THE MOTION FOR RECONSIDERATION

Congress historically has placed great emphasis on grievance procedures provided in collective bargaining agreements as the preferred means of resolving contract disputes. The Supreme Court has acknowledged this legislative intent in cases such as *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562-63 (1976), and *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 566, 569 (1960). Plaintiff argued at the August 10, 1979 hearing, however, that the arbitration award against her does not bar the present action because it was the product of employer wrongdoing. The alleged factual basis for this charge is contained in deposition testimony given by Arthur Martinez on May 25 and August 1, 1978. Martinez admitted that he had been lying throughout the administrative and grievance proceedings, and he now claims that plaintiff did in fact speak with him and Clough concerning reinstatement within the required time period. The union investigator is one of the persons to whom Martinez claims he lied. As the arbitrator himself observed in ruling that the union had delayed too long in pressing plaintiff's grievance, a major factor underlying the union's decision to drop the grievance originally was its inability to verify plaintiff's claim that she had spoken with Martinez and Clough. Neither the arbitrator nor the union representatives themselves could have known at the time of the arbitration hearing that Martinez would later admit to

lying to union investigators. Inasmuch as the arbitrator's decision was based on equitable considerations, plaintiff argued that he would not have ruled the union delayed too long in advancing her grievance had he determined that willful falsehoods by management personnel were responsible for that delay. In any event, plaintiff contended the actions of the employer's agent undermined the integrity of the contractual grievance procedures to such an extent that the arbitration award should not bar her from challenging her discharge in this court.

Defendant replied to plaintiff's arguments by contending that Martinez's claimed lie was irrelevant: plaintiff must, in defendant's opinion, still allege and prove the union breached its statutory duty of fair representation before the arbitration award in favor of the employer may be disregarded. Defendant's position, therefore, was that this court was deprived of jurisdiction over plaintiff's breach of contract claim against her employer when she agreed to have the union, which was once named a defendant in this action, dismissed.

At the August 10, 1979 hearing the court ruled in favor of plaintiff, accepting her argument that the employer may not invoke the bar of finality when its misconduct has interfered with the proper operation of the contractual grievance processes. Defendant's motion for reconsideration is based on a recent Ninth Circuit opinion, *Ness v. Safeway Stores, Inc.*, 598 F.2d 558 (9th Cir. 1979), which purportedly is contrary to this court's August 10th ruling.[1]

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[1]It is perhaps worth noting that the *Ness* case had actually been available for almost two months when last August's hearing was held, as it was issued on June 13, 1979.

In addition to citing *Ness*, defendant now strenuously contends plaintiff had other remedies available to her: (1) a proceeding before the National Labor Relations Board based on a charge of an unfair labor practice, (2) an attempt to persuade her union to reopen the contractual grievance processes, and (3) an action in federal court to vacate the arbitrator's award as one procured by fraud pursuant to section 10 of the Federal Arbitration Act, 9 U.S.C. § 10(a). Even assuming for the sake of argument that these suggested alternative courses were indeed available to plaintiff, defendant has still failed to cite any authority or offer any persuasive arguments that the availability of such alternative courses precludes or preempts an action by plaintiff under section 501 of the Labor Management Relations Act should such an action in other respects also have been open to her. The basic question for the present case remains whether claiming breach of the union's duty of fair representation is necessary to maintenance of a section 301 breach of contract action against an employer which, allegedly, has tampered with an subverted the contractual grievance processes.

In support of its position that no jurisdiction exists over the section 301 claim, defendant, as noted above, relies heavily on *Ness v. Safeway Stores, Inc.* Plaintiff places particular emphasis on the following language:

> Under 29 U.S.C. § 185, an employee may sue his union for breach of the duty of fair representation. An action for wrongful discharge also lies against the employer under § 185, *but only when the union is found to have breached its duty. Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 . . . (1976); *Vaca v. Sipes*, 386 U.S. 171 . . . (1967).

598 F.2d at 560 (emphasis supplied). *Ness*, however, did not involve any allegations of employer wrongdoing. It was

concerned solely with alleged union wrongdoing. To apply its language to section 301 suits where employer misconduct is alleged to have interfered with the union's ability properly to process an employee's grievance would be an extension of the *Ness* ruling unwarranted both by the facts of that case and by the holdings of the two Supreme Court cases *Ness* cites.

In *Vaca v. Sipes*, for instance, the Supreme Court considered the effect on a section 301 suit of a union's refusal to process a member's grievance. The Court held the failure of a wrongfully discharged employee to exhaust contractual remedies would not bar that employee from suing his former employer for breach of contract in federal court if he proves the union breached its duty of fair representation in the handling of the employee's grievance. 386 U.S. at 186. Nowhere, however, did the Court hold that this was the *only* situation in which failure to exhaust contractual remedies would not bar a section 301 suit against the employer. In fact, the Court discussed the issue as follows:

> [B]ecause these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures.
>
> An obvious situation in which the employee should not be limited to the exclusive remedial procedures established by the contract occurs when the conduct of the employer amounts to a repudiation of those contractual procedures. Cf. *Drake Bakeries v. Bakery Workers*, 370 U.S. 254, 260-263. See generally 6A Corbin, Contracts § 1443 (1962). In such a situation (*and*

> *there may of course be others*), the employer is estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action.

Id. at 185 (emphasis supplied).[2] Though not a formal repudiation within in [sic] the technical meaning given that term by contract law, an employer's lying to union investigators certainly constitutes an implied repudiation of the grievance process within the common definition of the word, and such a situation is, in this court's view, one of the "others" to which the *Vaca* Court referred. As the Court in *Vaca* itself observed, a case involving a union's breach of its duty is merely "*another situation* when the employee may seek judicial enforcement of his contractual rights." *Id.* (emphasis supplied). Moreover, the Court acknowledged, "It is true that the employer in such a situation may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed in the collective bargaining agreement." *Id.* at 185. The clear implication here is that an even stronger case for disregarding the defense of failure to exhaust is presented when the employer interferes with the proper functioning of the contractual grievance procedures.

Hines v. Anchor Motor Freight, Inc. is in accord with this reading of the *Vaca* decision. In *Hines* the Court held that an employee is not bound by an adverse arbitral decision resulting from a process which had fundamentally malfunctioned due to union breach of duty. As in *Vaca*,

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[2] Although much of *Vaca* is dicta, *see* 386 U.S. at 199-202 (Fortas, J., concurring), the Ninth Circuit has indicated that it agrees with *Vaca's* discussions relating to section 301 actions against employers. *Clayton v. ITT Gilfillen*, Nos. 77-2756, 77-2763, Slip Op. at 3356 n. 3 (Sept. 4, 1979); *Margetis v. Pam Pam Corp.*, 501 F.2d 179, 180 (9th Cir. 1974).

though, the Court in *Hines* does not hold that the union's breach of duty is a necessary prerequisite to maintenance of a section 301 action where remedies are provided by contract; it holds only that such a breach is a sufficient basis for disregarding the normal rules of finality applicable to such grievance proceedings. *See* 424 U.S. at 572. Also as in *Vaca*, there is language in *Hines* strongly suggesting that employer interference with the grievance procedures is an easier case for disregarding an award in the employer's favor than the case actually considered, that of union misconduct. *See, e.g.*, 424 U.S. at 569 ("Anchor would have it that petitioners are foreclosed from judicial relief unless some blameworthy conduct on its part disentitles it to rely on the finality rule."); *id.* at 570 ("Under the rule announced by the Court of Appeals, unless the employer is implicated in the Union's malfeasance or has otherwise caused the arbitral process to err, petitioners would have no remedy against Anchor even though they are successful in proving the Union's bad faith, the falsity of the charges against them, and the breach of contract by Anchor by discharging without cause.").

The *Hines* Court concluded, "Congress has put its blessing on private dispute settlement arrangements provided in collective agreements, but it was anticipated, we are sure, that the contractual machinery would operate within some minimum levels of integrity." *Id.* at 571. There is nothing in *Hines* to indicate the Court's broad statement regarding the legislature's intent is not equally applicable to the situation in which it is action of the employer—and not that of the union—which "seriously undermines the integrity of the arbitral process." *Id.* at 567. None of defendants' authorities are to the contrary. In fact, defendant has failed to come forward with any cases upholding arbi-

tration awards where the employer subverted the grievance process. The logic of *Hines* seems clear and unmistakable and, what is more, it is consistent with common sense. An artful liar should not be allowed to succeed in thwarting an employee's attempt to raise a grievance simply because the liar is the employer and not the union. Such a result would be unfair to the employee, contrary to congressional intent, and the utmost foolishness.

Therefore, it is the ruling of this court that if plaintiff proves the alleged lie to union investigators undermined the integrity of the arbitration process and that the liar or liars were agents of defendant, then the arbitrator's decision may be disregarded and plaintiff's breach of contract claim may be heard in this court on the merits. Defendant's motion for reconsideration is denied.

THE MOTION FOR CERTIFICATION OF ISSUE

Defendant has moved for an order pursuant to 28 U.S.C. § 1292(b) certifying for interlocutory appeal the issue of this court's jurisdiction over plaintiff's section 301 claim. It is not, however, the opinion of this court that this is an issue upon which "a substantial ground for difference of opinion" exists, nor does it appear that an "immediate appeal . . . may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The ultimate resolution of this dispute will be served best by proceeding with trial as presently scheduled. Defendant's motion for certification of issue is denied.

IT IS SO ORDERED.

Dated: 1/22/80

/s/ SPENCER WILLIAMS
United States District Judge

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 77-2889 SWSJ

Roni K. Dogherra
Plaintiff,

vs.

Safeway Stores, Incorporated,
a California corporation,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court, having tried the above-entitled action without jury and having heard the testimony of witnesses, reviewed the documentary exhibits submitted into evidence and considered the arguments and briefs of counsel, hereby makes the following Findings of Fact and Conclusions of Law.

I
FINDINGS OF FACT

(1) Plaintiff RONI K. DOGHERRA (hereinafter "Plaintiff") is an individual residing in Santa Cruz, California, which is within the jurisdiction of the United States District Court for the Northern District of California.

(2) Defendant SAFEWAY STORES, INCORPORATED (hereinafter "Defendant") is a corporation incorporated in the State of Maryland and licensed to do business in the State of California.

(3) Plaintiff was an employee of Defendant from June 3, 1974, to June 30, 1976.

(4) Plaintiff's employment by Defendant was covered by a collective bargaining agreement entered into by Retail Clerks Union Local No. 839 and Defendant, on or about June 1, 1974, and said agreement terminated on or about February 26, 1977.

(5) The collective bargaining agreement required Defendant to restore an employee who had been granted a non-occupational leave of absence for a period of six months to employment with the company with full seniority to a position comparable to the one held immediately prior to such leave of absence.

(6) Pursuant to the collective bargaining agreement in effect, Defendant granted Plaintiff a leave of absence for a period of six months, commencing on or about December 2, 1975, and terminating on or about June 2, 1976.

(7) During the months of May, 1976, and June, 1976, Arthur Martinez was the assistant manager of Safeway Store No. 904 located in Capitola, California.

(8) Plaintiff contacted Defendant's management personnel, specifically Arthur Martinez, prior to June 2, 1976, and informed him of her availability to return to work after her leave of absence and requested to be scheduled for work.

(9) Plaintiff was not scheduled for work by Defendant.

(10) Plaintiff was formally terminated from employment by Defendant on June 30, 1976, for the stated reason that she "did not return from six month non-occupational leave of absence within six month date."

(11) Defendant's employee, Arthur Martinez, told Plaintiff's union representatives who were investigating Plaintiff's grievance that Plaintiff had not contacted him prior to the expiration date of her leave of absence about returning to work upon the expiration of her leave of absence. He later testified under oath to the same effect before the State of California Unemployment Compensation Appeals Board.

(12) Plaintiff's Board of Adjustment proceedings were dropped because of the untruthful statements that had been made to them by Defendant's employee, Arthur Martinez.

(13) Defendant's employee, Arthur Martinez, later admitted to Clarence William Amos, a union representative of Plaintiff's, that he lied concerning Plaintiff's contacting him prior to June 2, 1976, of her availability and desire to return to work after her leave of absence, and so testified under oath in a deposition and before this Court.

(14) Plaintiff was wrongfully terminated from her employment with Defendant.

(15) Plaintiff has not been reinstated to her employment by Defendant and thus lost wages and pension benefits from the date of termination until now.

(16) Plaintiff has suffered a net loss of wages in the sum of $51,470.00.

(17) Plaintiff has suffered lost pension benefits in the sum of $4,986.00.

(18) Defendant, acting through its management representative, Arthur Martinez, acted in bad faith when he lied about Plaintiff's timely request to return to work and

further acted oppressively in pursuing this action after the fact of Martinez' lie became known, and particularly in bringing various needless, almost frivolous motions which had the result of unnecessarily increasing the amount of time plaintiff and her attorney were obliged to devote to this litigation.

II

CONCLUSIONS OF LAW

(1) Every conclusion of law contained in the above Findings of Fact shall be deemed to be a conclusion of law as if set forth herein as a conclusion of law. Every finding of fact contained in the following Conclusions of Law shall be deemed a finding of fact as if set forth as a finding of fact.

(2) Defendant by the untruthfulness of its employee, Arthur Martinez, in the union's investigative proceeding thwarted and subverted Plaintiff's efforts to arbitrate her grievance through a Board of Adjustment proceeding and thus the contractual machinery could not operate within the minimum level of integrity that Congress had anticipated when it put its blessings on private dispute settlement arrangements. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 571 (1976).

(3) Defendant employer by the untruthfulness of its employee, Arthur Martinez, in the union's investigative process has caused the arbitral process to err and thus Plaintiff employee has a valid cause of action against Defendant employer. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570 (1976).

(4) Plaintiff complied with the collective bargaining agreement in effect concerning her employment by con-

tacting Defendant's management personnel prior to June 2, 1976, concerning returning to work after her leave of absence.

(5) Plaintiff was wrongfully discharged from her employment by Defendant.

(6) Defendants must reinstate Plaintiff to employment with all the rights, benefits and seniority which a comparable employee has accumulated since Plaintiff's wrongful discharge.

(7) Defendant is obligated to pay Plaintiff the sum of $51,470.00 for lost wages and the sum of $4,986.00 for lost pension benefits resulting from Defendant's wrongful discharge of Plaintiff.

(8) Plaintiff is entitled to Judgment against Defendant, and Defendant is hereby taxed with all Court costs and attorney's fees. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

Dated: Apr 2, 1980.

/s/ SPENCER WILLIAMS
United States District Judge

Appendix E

In the Matter of an Arbitration
between
Retail Clerks Union Local No. 839,
Salinas, California,
Complainant,

and

Safeway Stores, Inc.,
Respondent.

Re: Termination of Roni K. Dogherra
Question of Arbitrability

OPINION AND DECISION
of
SAM KAGEL, Arbitrator

August 23, 1977
San Francisco, California

ISSUE:

This case involved Roni K. Dogherra. Ms. Dogherra was terminated by the Employer.

The issue in this case is the question of arbitrability which is raised by the Company. The Union also wanted to proceed on the question of the merits of the case, but it was determined that the Arbitrator would settle the matter of arbitrability first and depending upon that decision, the Parties would be informed that a hearing could be had on the merits.

DISCUSSION:

The Record on this Case:

A letter dated July 19, 1976 from the Union to the Food Employers Council stated that the Union had completed its investigation of the discharge of Ms. Dogherra, stating "As a result, we wish to convene a Board of Adjustment to take up this matter." (Ers.Ex.1)

On August 16, 1976, a meeting was set to consider the grievance subject noted in the July 19 letter. The meeting was cancelled. John Bacon of the Food Employers Council testified he had a later conversation with Mr. Russell of the Union in which Russell stated that the case was dropped because the Union found a lack of sufficient evidence to proceed (Tr.7).

August 23, 1976, Bacon wrote a letter to Mr. Hillis of Safeway Stores stating that he [Bacon] had been advised that the grievance of Ms. Dogherra was dropped and that a Board of Adjustment meeting would not be necessary.

February 2, 1977, Bill Amos, President of the Union, wrote a letter to Mr. Hillis of Safeway requesting an immediate Board of Adjustment regarding Ms. Dogherra's case stating:

> ". . . due to the fact that new evidence has been presented on her case.
>
> "Please advise us as to the most convenient date and time for us to convene this Board of Adjustment." (Ers.Ex.3)

February 4, 1977, Hillis sent a letter to Bacon concerning Ms. Dogherra's case, enclosing a letter of February 2 from Mr. Amos (Ers.Ex.2).

February 14, 1977, Bacon addressed a letter to Amos referring to the letter that Amos had written on February 2, 1977, involving Ms. Dogherra and Mr. Bacon stated in his letter:

> "On August 23, 1976, this matter was dropped by Local 839. In a telephone conversation with Bill Russell on that date, I was advised that a Board of Adjustment would not be necessary. I am enclosing a copy of my letter to Hillis on that date confirming this fact.
>
> "In view of the above, and in view of the passage of time, it is my opinion that there is no obligation on our part to reopen this file." (Ers.Ex.5)

February 17, 1977, Thornton C. Bunch, Jr., counsel for the Union, addressed a letter to Bacon referring to Bacon's letter to Amos of February 14, 1977, in which Mr. Bunch asked that a Board of Adjustment meeting be set (Ers.Ex.6).

February 22, 1977, Bacon addressed a letter to Mr. Bunch in which he stated:

> "We are perfectly willing to have a Board of Adjustment. Our view of the issue is whether the merits of the case are grievable and/or arbitrable. We feel they aren't. You, I assume, disagree. Therefore, I suggest that the Adjustment Board step be waived and we proceed to select an arbiter. If you still want a Board of Adjustment, I will plan on having it in our offices on February 24, 1977 at 5:00 p.m." (Ers.Ex.7)

February 24, 1977, a letter from Bacon to Bunch confirmed their telephone conversation and cancelled the Board of Adjustment set for 5:00 p.m. February 24, 1977, suggesting that they exchange names and proceed to arbi-

tration. Bacon stated: "I am in no way waiving my position that this matter is not grievable and I would proceed to arbitrate the question of arbitrability." (Ers.Ex.8).

March 10, 1977, Bunch sent to Bacon the suggested names of arbitrators and the Parties agreed upon the Arbitrator in this case.

Bob E. Russell, who had been President of the Local Union at the time that the grievance was first filed, testified that he talked to Bacon on August 23, 1976, and he testified as follows in response to questions by Union counsel Bunch:

> "Q. [Union Counsel Bunch] What was the substance of that conversation [August 23, 1976 with Bacon]?
>
> "A. [Russell] Well, at that time I told John that we were investigating the case, and it looked to me from the evidence that we had that we were going to have to drop it.
>
> "And because we had requested certain information from Roni [the Grievant], and we had not received it.
>
> "Q. You had not received it as of the 23rd of August?
>
> "A. No.
>
> "Q. What information was that?
>
> "A. We wanted a doctor's release because, as I understand it, the case was for—she was off on a disability on a six-months' leave.
>
> "She had went back to notify the store, I think, the last week or sometime in June, just prior to the end of the six months.
>
> "THE ARBITRATOR: That's '76?
>
> "THE WITNESS: '76. And, she was supposed to have contacted the Assistant Manager or the Manager. I'm not sure.

"And, then I notified—had Mr. Struthers, a Business Representative, to check this out. This is prior up to this time.

"Q. [By Mr. Bunch] So far as you know, did Mr. Struthers make an investigation?

"A. Yes, and it was from his report to me that we did not have a doctor's release, which it's the policy on sick leave that you need it with Safeway.

"And let's see, I understand that the—also that the man which she was supposed to have contacted wasn't in that day. So with that information I reported to John I didn't think we had a case.

"Q. And you indicated to Mr. Bacon that the Union was dropping the grievance?

"A. That point's a little vague, Carl.

"I mean I don't know whether I actually said we were dropping it entirely or the record would show, from what I had, was not enough to proceed.

"Q. Okay. Do you know whether that conclusion or determination on the part of the Union was communicated to Dogherra in any way?

"A. I'm sure that Business Agent, Bill Struthers, was in contact with her." (Tr. 15-16)

On cross-examination by John Bacon, Russell was asked to be more detailed in his exact characterization of Ms. Dogherra's case when he spoke to Bacon on the 23rd and he responded as follows:

"Q. [By Mr. Bacon] Can you recall with a little more precision the exact characterization of your case to me on the 23rd?

"A. [Russell] I believe we were discussing a—the issue that she had been off on disability and she should have been returned to work, that we were aware of the fact that the Company policy is that they—we would have to have a doctor's release in order to

do it because we have been unable in the past for getting anybody to have an extension of sick leave.

"They took a hardnosed position on the six months.

"We needed a copy of a doctor's release because we would pick up the issue that who she notified in the store was sufficient, but in absence of that, and in—I mean—with the investigation that she actually—the person who she talked to was not in the store at the time. I didn't feel that we were going to have a case." (Tr. 17-18)

Russell testified that about that time Safeway opened a store in Monterey and the Union attempted to get a position for Ms. Dogherra in that store; that in seeking that position the Union was not seeking to have her reinstated from her leave of absence, but was trying to get her "new employment." (Tr. 19)

Bill Struthers was serving as an organizer or relief Business Representative for the Union at the time of this incident and participated in the investigation of the grievance filed by Ms. Dogherra. He testified that he spoke to Ms. Dogherra on August 12 at Cindy's restaurant in Santa Cruz and at that time she indicated she was wanting to clear her record and that she really didn't want to go back to Safeway, but that if the Union couldn't clear her record, then she wanted to go all the way with the Board of Adjustment and arbitration, if necessary, to get full reinstatement (Tr. 20).

Ms. Dogherra commenced her leave of absence on December 2, 1975 so that her leave of absence would have expired on June 2, 1976. Ms. Dogherra, according to Struthers, advised him that she had contacted some people in the store regarding her return to work and that those

contacts were made prior to June 2; that he investigated the names that Ms. Dogherra had given to him and that he couldn't find anyone who could place her in the store before June 2; that she stated she spoke specifically to Art Martinez, the Assistant Manager, and in checking, Struthers found that Martinez had been on vacation the last week of May (Tr.20-21). Thereafter, Struthers told Russell that it was his recommendation that the Union drop the case; that they couldn't come up with any evidence. At the time he met with Ms. Dogherra on August 12, he had phoned her previously asking her to bring a medical release and that he never received it. He told her that the Union would have to have it by Monday at the Board of Adjustment; that he never did get a copy of the medical release (Tr.21-22).

Ms. Dogherra testified that she met with Mr. Struthers on or about August 12 at Cindy's restaurant; that he advised her that the meeting of the Board of Adjustment had been cancelled; that they discussed the case "but to absolutely what we were discussing, no, I don't remember." (Tr.27). Yet, she denied that Struthers told her that the Union believed she had a bad case and that he (Struthers) was not able to verify the information that she had given him about who she had talked to in the store prior to June 2 (Tr.28).

SUMMARY:

This case is clear that the Parties had agreed to a Board of Adjustment meeting on the termination of Ms. Dogherra; that the meeting was cancelled by mutual agreement; that there was sufficient evidence given to the Employer that the meeting was cancelled because the Union had made an investigation and believed that it did not

have a suitable case to proceed to the Board of Adjustment. Some five months thereafter the Union sought to reconstitute a system Board of Adjustment on Ms. Dogherra's case. It must be accepted that when there is a grievance and a Board of Adjustment meeting is requested and such request is granted and the Union then drops the case, it cannot then be resurrected some five months thereafter. Such a practice would be violative of the principle that is behind all provisions dealing with the adjustment of grievances; i.e. that they should be completed within a reasonable time, that the Employer had the right to rely on the withdrawal of the case. It must be found that Ms. Dogherra was, in fact, informed that the case was not proceeding and the reasons therefor, namely, her defense that she had talked to Martinez did not check out and that she had not supplied the Union with the necessary medical release.

DECISION:

The grievance of Ms. Roni Dogherra is not arbitrable.

/s/ SAM KAGEL
Arbitrator